BANK NEGARA MALAYSIA

v.

MOHD. ISMAIL ALI JOHOR & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. P. 24-490-86]
8 JANUARY 1990

CIVIL PROCEDURE: *Writ for summary judgment - Affidavit in support - Allegation that liability admitted by the defendant vide letters - Statement of defence - Question of mixed fact and law - Whether the plaintiff had breached terms of agreement - Allegation of estoppel - Legal effect of representations made vide letter by plaintiff - Whether issues can be satisfactorily determined to grant summary judgment under O. 14 RHC 1980.*

The plaintiff instituted this action and alleged in the statement of claim endorsed on the writ that by an agreement in writing that is the scholarship agreement and in consideration of the plaintiff granting the first defendant a scholarship, the first defendant *inter alia* undertook to serve the plaintiff for a period of ten years upon the completion of the said studies, failing which he would be liable to pay the plaintiff, on demand, agreed liquidated damages of RM70,000. It was alleged that upon initial service with the plaintiff, on 3 November 1984 the first defendant in breach of the said agreement left the service of the plaintiff. Hence this writ.

On 22 December 1986 the three defendants filed a joint statement of defence, in which a number of key issues were raised.

On 18 January 1988 the plaintiff applied for, summary judgment under O. 14 for RM70,000 with interest thereon at the rate of 8% p.a. Both parties submitted further averment *vide* affidavits filed. In the affidavit in support filed by the plaintiff it was asserted *inter alia* that in response to demands from the plaintiff the first defendant had admitted, among other things the plaintiff's claim and a letter supposedly written by the first defendant was exhibited to show the extent of the said admission.

Held:

[1] It is trite law that O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried. It is stated that, "when the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff".

[2] The definition of "no fairly arguable point to be argued" is that if the defence can raise serious questions in law or fact to resist the plaintiff's claim summary proceeding under O.14 is not appropriate.

[3] It has also been said that even though the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried" but nevertheless if it is apparent to the Court that for some other reason there ought to be a trial for example if the plaintiff relied on assignment of his right to institute the action the assignment is defective, judgment should not be given under O. 14.

[4] The Court is not bound to require documentary evidence from the plaintiff however if he elected to put in an affidavit to support his applicaton for summary judgment or in reply to the affidavit of the defendant in opposition to his application under O.14 then the Court is bound to look at all the circumstances before deciding whether the defence set up is a *bona fide* defence.

[The plaintiff is not entitled to obtain summary judgment under O. 14. Appeal of the first defendant against the order of the SAR allowed.]

Cases referred to:
Anglo Italian Bank v. Wells 38 LT 201 ***(foll)***
Ooi Boon Leong & Ors. v. Citibank N.A. [1984] 1 MLJ 222 ***(cons)***
Blaiberg v. Abrams 77 LTJ 255 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff/respondent - P.H. Yeo; M/s. Shook Lin & Bok
For the defendant/applicant - Joseph Yeo; M/s. Tay, Ibrahim & Partners

JUDGMENT

Lim Beng Choon J:

The plaintiff instituted this action against Mohd. Ismail bin Ali Johor (the first defendant) and two others on 13 December 1986. In the statement of claim endorsed on the writ, the plaintiff alleged that by an agreement in writing dated 21 July 1980 (the scholarship agreement) and in consideration of the plaintiff granting the first defendant a scholarship to pursue a course of study in the University of Malaya leading to the award of an Honours Degree in law, the first defendant *inter alia* undertook to serve the plaintiff for a period of ten years upon the completion of the said studies, failing which he would be liable to pay the plaintiff, on demand, agreed liquidated damages of RM70,000. It was also alleged that the first defendant completed his studies and commenced serving the plaintiff from 1 June 1984 but on 3 November 1984 the first defendant in breach of the said agreement, left the service of the plaintiff. It was further alleged that despite repeated demands from the plaintiff the defendant failed and/or refused to pay the plaintiff the agreed liquidated damages.

The second and third defendants are being sued in their capacity as guarantors for the due performance of the scholarship agreement by the first defendant.

On 22 December 1986 the three defendants filed a joint statement of defence. Their defence may be summarised as follows:

(1) As the plaintiff had breached a condition precedent of the scholarship agreement by failing to provide the first defendant with a post consistent with the qualification obtained by him, the obligation of the first defendant to serve the plaintiff, under the scholarship agreement was extinguished;

(2) In any event as the sum of RM70,000 is a penalty claim, the said claim is time barred as the action was filed after the expiry of the period of one year from the date of the breach;

(3) Alternatively the entire scholarship agreement should be struck down on the ground that it contained unconscionable terms and that it was opposed to public policy particularly when it was made by parties with unequal bargaining power;

(4) In the further alternative the defendants aver that:

(i) the plaintiff has waived its right under the scholarship agreement as it has entered into a new agreement with the defendants whereby it agrees not to claim the alleged sum of RM70,000 in the event that the first defendant is prepared to work with the Attorney-General's Chambers;

(ii) the first defendant has accepted the aforesaid offer when he applied to the Attorney General for a post on 15 September 1986;

(iii) the first defendant attended several interviews for the said post and he was only informed that his application was not successful when he received a letter dated 6 October 1987 from the Attorney-General's Department;

(iv) by reason of the first defendant's failure to secure a post with the Attorney General's Department, the aforesaid new agreement is frustrated. At any rate the defendants aver that the plaintiff is estopped from claiming against the defendants.

On 18 January 1988 the plaintiff applied by way of summons-in-chambers (encl. 3) for summary judgment under O. 14 of the Rules of the High Court 1980 (the RHC) for RM70,000 with interest thereon at the rate of 8% p.a. In the affidavit in support affirmed by the personal manager of the plaintiff bank (encl. 2) it was asserted *inter alia* that in response to demands from the plaintiff the first defendant admitted, among other things, the plaintiff's claim and a letter written by the first defendant dated 24 December 1985 was annexed as Exhibit 'BNM-2' to the said affidavit to show the extent of the said admission.

The first defendant thereafter filed his affidavit in reply on 12 April 1988 (encl. 8) to elaborate on the averments appearing in the joint statement of defence. He produced some contemporaneous letters to support the claims made by him in the joint statement of defence. I shall have more to say about these letters shortly. The second defendant too filed an affidavit (encl. 9) opposing the plaintiff's application. Besides adopting the points of defence of the first defendant the second defendant also said *inter alia* that the plaintiff had varied the scholarship agreement by increasing the scholarship grants without the knowledge and consent of both the guarantors. In the result both the second and third defendants obligations under the guarantee were discharged.

In answer to the first defendant's claims, the plaintiff submitted another affidavit (encl. 13) exhibiting a letter written by the first defendant dated 14 December 1984 which the plaintiff said amounted to an admission on the part of the first defendant regarding his breach of the scholarship agreement and an offer made by him to repay the sum of RM70,000 by monthly instalments. In addition it was stated that while he was working with the plaintiff's bank the first defendant was attached to "the Bank Regulation Department whose function was to administer all legislation relating to banks."

It is trite law that O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can **prove his claim clearly** and if the defendant is unable to set up a *bone fide* defence or raise an issue against the claim which ought to be tried. Thus it is stated in *Anglo-Italian Bank v Wells* 38 LT p.201 that "when the Judge is satisfied not only that there is no defence but no **fairly arguable point to be argued** on behalf of the defendant it is his duty to give judgment for the plaintiff." This proposition is I must say simple enough but its application to the facts of a particular case often gives rise to some difficulties. I must therefore delve deeper into the case law for a definition (if one is available) of "no fairly arguable point to be argued . " The Privy Council in *Ooi Boon Leong & Ors. v. Citibank N.A.* [1984]1 MLJ

222 has stated that if the defence can raise serious questions in law or fact to resist the plaintiff's claim summary proceedings under O. 14 is not appropriate. It has also been said that even though the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried" but nevertheless if it is apparent to the Court that for some other reason there ought to be a trial for example if the plaintiff relied on assingment of his right to institute the action and the assignment is defective, judgment should not be given under O. 14. Although the Court is not bound to require documentary evidence from the plaintiff however if he elected to put in an affidavit to support his application for summary judgement or in reply to the affidavit of the defendant in opposition to his application under O. 14 then the Court is bound to look at all the circumstances before deciding whether the defence set up is a *bona fide* defence (per Bowen LJ in *Blaiberg v. Abrams* 77 LTJ 255).

In applying the principle enunciated in the aforementioned authorities to the present case, it is to be noted that the first issue raised by the defence is that since the plaintiff had failed to appoint him in a post with the plaintiff bank which was consistent with his legal qualification, it had breached certain terms of the scholarship agreement. This issue involves a question of mixed law and fact. It calls for a proper construction of Clause 1(c) of the scholarship agreement which states:

> that he (the first defendant) will upon being required to do so by The Bank serve The Bank or any Ministry or body (whether corporate or unincorporate) that may be so determined by The Bank in a post consistent with the qualifications obtained by The Scholar to which he may be appointed for a period of ten (10) years from the date of his appointment upon the terms and conditions for the time being usually applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto.

It would appear that the plaintiff was obliged under this clause to appoint the first defendant in a post with the bank consistent with his legal qualification and to pay him a salary commensurable with his legal qualification to hold such a post. Apart from this clause it was also stated elsewhere in the scholarship agreement that the plaintiff's right to demand the first defendant to serve the bank would only arise if the first defendant had been given a post consistent with his legal qualification (see for example Clause 2 and clauses 3(d) and (e) thereof). The right of the plaintiff therefore depends also on a proper construction of those other terms appearing in the said agreement. As to the factual situation, the first defendant asserted, on the one hand, that he was appointed as an Administrative Officer dealing with account in the plaintiff bank and he produced a letter written by him to Peguam Negara dated 15 September 1986 (Exhibit 'MS3' annexed to encl. 8) when it was stated *inter alia* that:

> Sebelum saya berkhidmat dengan firma guaman tersebut saya pernah berkhidmat sebagai **Pegawai Pentadbiran** selama empat (4) bulan di Bank Negara Malaysia, Kuala Lumpur. (Emphasis is mine)

The plaintiff, on the other hand, said that the first defendant was appointed to a post dealing with legislation of banks but it has not produced any evidence to rebut the first defendant's allegation except a letter written by the first defendant dated 3 October 1984 (Exhibit 'A' annexed to encl. 13) showing that the first defendant was at the material time attached to the Jabatan Pengawalan Bank of the plaintiff bank. Such a description of a post is to my mind neither here nor there. Quite apart from this meagre evidence, I observe that in a letter written by the first defendant dated 24 December 1985 on which the plaintiff is heavily relying as admission of liability on the part of the first defendant, it is stated that:

> While I was working with your clients, I found that there was no post for Legal Officer and the post that was given to me was only as an Administrative Officer and your clients day by day give me hope that they are going to set up a legal department. However, as I waited patiently there were not even a proposal to set up such department and as such my knowledge accumulated would have been of no avail. Due to this I decided to put to good use of my qualifications and join the private sector as legal assistant.

In such a state of affairs I have no doubt that the issue raised by the defendant can only be resolved at the trial proper.

The second issue raised by the defence also involves a question of mixed law and fact. In this connection it is to be noted that the plaintiff in its statement of claim alleged that by leaving the service of the bank on 3 November 1984, the first defendant was in breach of the scholarship agreement thereby entitling it to claim the sum of RM70,000. The first defendant however, claimed that the plaintiff was estopped from instituting this suit since it had in September 1986 agreed not to take any action against the first defendant if he consented to serve as a legal officer in the Jabatan Peguam Negara. In support of his claim the first defendant exhibited a letter written by the plaintiff dated 22 September 1986 to the Peguam Negara and copied to the first defendant. It reads:

> Tuan,
>
> Permohonan Berkhidmat Dengan Jabatan Peguam Negara - Encik Mohd. Ismail Bin Ali Johor
>
> Dengan hormat, saya merujuk kepada permohonan Encik Mohd. Ismail bin Ali Johor (bekas kakitangan Bank Negara Malaysia) bertarikh 15 September, 1986, dan dengan ini mengesahkan bahawa pihak Bank Negara Malaysia bersetuju memindahkan perjanjian perkhidmatan beliau kepada Jabatan Peguam Negara. Pemindahan ini tertakluk kepada Encik Mohd. Ismail berkhidmat dengan Jabatan Peguam Negara selama tempoh kontrek beliau.
>
> Sekian dimaklumkan.
> Yang benar,
>
> (Sharifah Mariah Alfah)
> Pengurus,
> Bahagian Personel.

Bearing in mind that the plaintiff's cause of action is based on the breach of the scholarship agreement when the first defendant left the service of the plaintiff on 3 November 1984, this letter may well support the first defendant's allegation of estoppel. This is so particularly when the first defendant relying on the representation made by the plaintiff applied for a post as a legal officer in the Jabatan Peguam Negara as a result of which he attended two interviews in early 1987 held by the Suruhanjaya Perkhidmatan Awam. He was not informed of the result of the two interviews and in August and September 1987 he again attended further interviews conducted by the same body. He still did not get any information regarding these interviews. It was only on 6 October 1987 that he was told that his application for the post with Jabatan Peguam Negara was rejected. Under the circumstances can this second issue be determined at this threshold stage? The answer must be a definite 'no' simply because one would want to know what made the plaintiff write the said letter and what is the legal effect of the representation made in that letter. The said issue is further complicated by the fact that even before the first defendant had received the letter of rejection the plaintiff had instituted this action.

From the affidavits of the plaintiff it would appear that it is relying strongly on the two letters written by the first defendant dated 3 October 1984 and 24 December 1985 which I have cited earlier as an admission of liability on the part of the first defendant. Based on the

said admission, the plaintiff therefore suggested that it is entitled to obtain judgment against the first defendant. I am not prepared to accept the plaintiff's proposition. Even assuming that the two letters of October 1984 and December 1985 do amount to an admission, it is still debatable whether the plaintiff is not precluded from relying on that admission by reason of its subsequent conduct as stated in this judgment. I am not convinced that this point can be satisfactorily determined at this O. 14 stage.

For the reasons as stated above I was and still am satisfied that the plaintiff is not entitled to obtain summary judgment under O. 14. I therefore stand by my decision in allowing the appeal of the first defendant against the order of the Senior Assistant Registrar.

Also found at [1992] 1 CLJ 653